INDEX

CITATIONS

410-987—70——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 156

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, PETITIONER

v.

YEE CHIEN WOO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (A. 40) is reported at 419 F. 2d 252. The opinion of the district court (A. 46) is reported at 295 F. Supp. 1370.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1969 (A. 51). On March 23, 1970, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including May 16, 1970. The petition for a writ of certiorari was filed on May 13, 1970, and granted on October 19, 1970 (A. 51). This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien who firmly resettled in a non-Communist country for 7 years after flight from a Communist country is eligible for an immigrant quota preference within the meaning and intent of Section 203(a)(7) of the Immigration and Nationality Act.

STATUTE INVOLVED

Section 203 of the Immigration and Nationality Act of 1952, as added, 79 Stat. 912, 8 U.S.C. (Supp. V) 1153, provides in pertinent part:

> (a) Aliens who are subject to the numerical limitations specified in section 201(a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
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> * * * * *
>
> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or

unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided,* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

STATEMENT

Respondent is a native of Communist China who left there in 1953 and has never returned. In 1953 he went to Hong Kong and opened a clothing business; he was married there the same year and subsequently had a son. He lived in Hong Kong continuously from 1953 until 1959, when he came to this country as a visitor for business. He returned to Hong Kong in 1959 and continued to reside there with his wife and child until 1960 (A. 7–9).

On May 22, 1960, respondent came to the United States as a temporary visitor for business to attend the San Diego Fair and International Trade Mart, where he sold merchandise imported from his business in Hong Kong. He maintained his business in Hong Kong until some time in 1965. His authorized temporary stay in the United States expired in 1966, but he remained here unlawfully; his wife and child had come to the United States in 1965 (after a stopover in Canada) as temporary visitors and likewise overstayed their temporary period (A. 9). A joint deportation hearing against respondent and his wife resulted in an order for their deportation in 1966 unless they voluntarily departed, which they did not do.[1] (A. 9).

On March 8, 1966, the same date on which the deportation orders were entered, respondent filed with the Immigration Service an application under the proviso of Section 203(a)(7) of the Act seeking classification as a refugee (A. 3-5).[2] His application alleged that he had been a businessman on the mainland of China, that the Communists expropriated his business, and that he fled from Communist China in

[1] The order has not been challenged.

[2] The proviso to Section 203(a)(7), and the regulations thereunder (8 C.F.R. 245.4), provide that an alien who has been continuously physically present in the United States for at least two years, who believes that he meets the pertinent requirements of the Section's general provisions and who desires to acquire the status of a permanent resident under the terms of that proviso, may apply to the appropriate district director for classification as a refugee.

1953 (A. 4). When interviewed by an immigration officer in 1966, in connection with this application, respondent stated that he had no property, assets or relatives in Hong Kong (A. 8–9).

The District Director denied respondent's application on the ground that he was ineligible for the refugee preference since he had become firmly resettled in Hong Kong following his flight from Communist China (A. 11–13). On April 11, 1967, the Regional Commissioner affirmed the denial of the application (A. 23–24).

On May 9, 1967, respondent filed the instant action in the United States District Court for the Southern District of California to review the denial of his application (A. 25). The district court concluded that respondent had not firmly resettled in Hong Kong, on the ground that he did not intend to remain there permanently, and remanded the case (295 F. Supp. 1370; A. 40). Upon this view of the facts, that court found it unnecessary to decide whether firm resettlement in Hong Kong would preclude respondent's classification as a refugee under Section 203(a)(7) of the Act. On the government's appeal, the court of appeals affirmed the district court order, but on a different ground. It held that it was irrelevant, for purposes of Section 203(a)(7), whether respondent was firmly resettled in Hong Kong, since it read that section as granting benefits to a refugee even though he had become firmly resettled after the occurrence of the circumstances which caused him to become a refugee. It there-

410-987—70——2

fore ruled as a matter of statutory construction that the Regional Commissioner erred in denying respondent's application (419 F. 2d 252; A. 46).

ARGUMENT

INTRODUCTION AND SUMMARY

Section 203(a)(7) of the Immigration and Nationality Act of 1952, as added in 1965 (8 U.S.C. 1153 (a)(7)), is the first permanent provision in the immigration law for a limited annual world-wide quota preference for refugees.

It provides in essence that aliens abroad may apply in any non-Communist or non-Communist-dominated country for conditional entry into the United States if (i) they have fled from any Communist or Communist-dominated country or area because of persecution or fear of persecution for reasons of race, religion, or political opinion, and (ii) are remaining away from such country or area for those reasons, and (iii) are not nationals of the country in which they apply for conditional entry. The proviso to Section 203(a)(7) and the regulations thereunder (8 C.F.R. 245.4) provide further that an alien who has been continuously present in the United States for at least two years may, if he believes that he meets the refugee requirements of the Section's general provisions and desires to acquire the status of a permanent resident, apply to the appropriate district director for classification as a refugee.

The court of appeals in this case held that the benefits of this section are available to aliens who, follow-

ing their initial dislocation from their home country, have become firmly resettled in another country outside the United States.[3] Its construction of the statute is contrary to the decision of the Second Circuit in *Shen* v. *Esperdy*, 428 F. 2d 293, and the consistent administrative interpretation of the provision.[4] The application of the present decision to the world wide pool of firmly resettled refugees would have the detrimental effect of subjecting the small 10,200 annual quota to continuous oversubscription and exhaustion. In practical effect, this means that other aliens who are in fact homeless may well be denied relief.

As we shall show, this was not the intent of the present legislation or of the legislative background from which it stemmed. The history of temporary refugee legislation leading up to Section 203(a)(7) shows that Congress (and the administrative authorities) consistently excluded resettled refugees from the benefits of this type of remedial legislation. The Displaced Persons Act of 1948 and the Refugee Relief Act of 1953 both contained express limitations bottomed on "firm resettlement." The Refugee Relief Act of 1957, although not expressly incorporating

[3] The United States recognizes no general right of political asylum. *Soewapadji* v. *Wixon*, 157 F. 2d 289, 290 (C.A. 9) certiorari denied, 329 U.S. 792; *Ex parte Kurth*, 28 F. Supp. 258, 263–264 (S.D. Cal.). See also United States reservation to Convention on Asylum, Havana, 1928, reported in II Hackworth, *Digest of International Law* 647. Refugees may be admitted to this country only in accordance with the specific terms and conditions set by Congress.

[4] See *Matter of Ng*, 12 I&N Dec. 411; *Matter of Moy*, 12 I&N Dec. 117; *Matter of Sun*, 12 I&N Dec. 36.

such a limitation, was a special statute administered throughout under firmly resettled principles pursuant to Department of State regulations. The primary purpose of the "Fair Share Act" of 1960 was support of the United Nations World Refugee Year program to liquidate the remaining displaced persons camps in Europe. Although, like the 1957 Act, it contained no express "firm resettlement" limitations, the legislative history shows that this legislation also was not intended to apply to refugees who had firmly resettled in the country of initial asylum.

Against this background Congress in 1965 passed the present Section 203(a)(7) as permanent remedial legislation providing an annual refugee quota of 10,200. This provision was almost identical in its definitional language with the 1957 and 1960 Acts. The legislative history indicates that here too Congress intended to allocate a permanent flexible quota for dislocated persons in emergency situations. With the exception of the instant decision, the courts which have been confronted with the issue have ruled that the present refugee statute does not apply to aliens who were once refugees but are now "firmly resettled" in some other country.[5]

The view of the court below is predicated upon a formalistic reading of statutory language divorced from any analysis of the complex legislative back-

[5] In addition to *Shen* v. *Esperdy*, *supra*, see *Min Chin Wu* v. *Fullilove*, 282 F. Supp. 63 (N.D. Cal.); *Ou Yeung* v. *District Director*, No. 68-1563-F. (C.D. Cal.), February 6, 1969.

ground from which the present statutory provision arose. The Second Circuit in *Shen* v. *Esperdy, supra,* has carefully analyzed the legislative framework; and it has concluded—rightly we submit—that this was not Congress' intent but contrary to it. Even though a person has been uprooted from his homeland by some political upheaval or natural calamity, once he has found security in a place where he has the opportunity to establish himself—as respondent did in Hong Kong—the statute requires him to effectuate any subsequent desire to transfer his residence to this country under ordinary immigration channels, not pursuant to special provisions reserved for persons who are still homeless refugees.

THE LEGISLATIVE HISTORY OF THE PRESENT STATUTE PLAINLY SHOWS THAT THE RELIEF IT PROVIDES IS NOT AVAILABLE TO A REFUGEE WHO HAS FIRMLY RESETTLED IN A COUNTRY THAT OFFERS HIM A PERMANENT HAVEN

A. THE LEGISLATIVE BACKGROUND

1. The period 1947-1960

a. At the end of World War II, there were some eight million displaced persons in Europe; seven million of these had accepted repatriation, leaving one million as a problem of international concern.[6] On December 15, 1946, the United Nations General Assembly approved a draft constitution of a proposed International Refugee Organization (IRO). In the

[6] *Displaced Persons in Europe*, S. Rep. No. 950, 80th Cong., 2d Sess. 2-3, 8.

United States, a Senate Resolution (S. Res. 137) authorized the Committee on the Judiciary to make a full investigation of the entire immigration situation, including the problem of displaced persons in Europe. On March 2, 1948, the Committee submitted its report (S. Rep. 950, 80th Cong., 2d Sess.) and reported out a bill (S. 2242) that was enacted as the Displaced Persons Act 1948. 62 Stat. 1009. Section 2(b) of the Act defined a "[d]isplaced person" in terms of the Constitution of the International Refugee Organization, which provided, *inter alia,* that refugees and displaced persons would cease to be of concern to the Organization upon their return to countries of their nationality in United Nations territory, their acquisition of new nationality, or *their firm establishment* otherwise (Annex I, Part I, Section D; S. Rep. 950, *supra,* at p. 68).[7]

[7] Section 2(c) defined an "[e]ligible displaced person" as a displaced person, as defined in Section 2(b), who on or after September 1, 1939, and before December 22, 1945, entered Germany, Austria, or Italy and on January 1, 1948, was in an Allied sector or zone of those countries; also included as an eligible displaced person was one who had previously resided in Austria or Germany and had been either detained therein or left, as a result of persecution by the Nazi government, but had later been returned to Austria or Germany as a result of enemy action, or circumstances of war and, on January 1, 1948, had not been firmly resettled therein. Although firm resettlement is specified here as a disqualifying factor only for those displaced persons who had previously resided in Germany or Austria and had been returned thereto, both categories of "eligible displaced persons," as defined in Section 2(c) of the Act incorporate by reference the requirement of being "the concern of" IRO.

b. Dissatisfaction with this legislation, including its 1948 cut-off date,[8] resulted in concerted efforts at amendment. Divine, *American Immigration Policy, 1924–1952*, pp. 130–132, Yale University Press, New Haven, 1957. As finally enacted after a conference report (H. Rep. 2187, 81st Cong., 2d Sess.), the amendment retained the incorporation of the provisions of IRO's constitution.[9] It further explicitly provided that firm settlement or firm resettlement would render an applicant ineligible for each category of displaced persons recognized in the act; excluded from this limitation were orphans and a special group numbering only 500 whose admission into the United States was to be recommended by the Secretaries of State and Defense.[10]

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[8] See note 7, *supra*. This concern regarding the cut-off date stemmed from the burgeoning problem of refugees fleeing from Communist countries. In its final form, the amended legislation dealt with this problem by extending the "cut-off" date to 1949 and increasing the number of eligible displaced persons to 341,000 (64 Stat. 219, 221).

[9] There had been a proposal to divorce the definition of a displaced person from the pertinent provisions of IRO's constitution; this proposal significantly made it explicit, however, that the concept of firm settlement or firm resettlement would disqualify an applicant. S. Rep. 1237, 81st Cong., 2d Sess. 7.

[10] The recognized categories of displaced persons included three new ones—European refugees in the Far East, honorably discharged veterans of the Polish Army, and certain Greek immigrants. The conferees specified that Far East refugees would be disqualified if they had been received for permanent residence in any country other than the United States and that firm settlement or resettlement would disqualify applicants under the other two new categories (see H. Rep. 2187, 81st Cong., 2d Sess. 4, 5, 13, 14).

This highly complicated legislation, hammered out after much debate and controversy, provided at all stages that firm resettlement would disqualify a prospective immigrant under the Act. That this requirement was not discussed in any of the reports is hardly surprising in the circumstances; it proves only that no discussion was deemed necessary since all accepted resettlement as an essential limitation. After all, this was legislation seeking solution of the displaced persons problem, which stressed that resettlement had to be achieved through an international cooperative effort.[11]

c. As thus amended, the 1948 Act expired on December 31, 1951 (65 Stat. 96). On May 15, 1953, at the recommendation of President Eisenhower, a bill was introduced (S. 1917) to authorize 240,000 special quota immigrant visas to certain escapees, German expellees, and nationals of Italy, Greece and the Netherlands; the Senate Committee on the Judiciary reported favorably on this proposal with amendments, characterizing it as a temporary provision designed to meet an emergency situation, to extend over a period of three years (S. Rep. 629, 83d Cong., 1st Sess. 1-3, 7 (1953)). As finally passed on August 7, 1953 (67 Stat. 400), the Refugee Relief Act included a specific

[11] Section 3(a) of the Act, as amended, imposed upon the Secretary of State the duty of procuring the cooperation of other nations, particularly the members of the International Refugee Organization, in the solution of the displaced persons problem by their accepting for resettlement shares of displaced persons (64 Stat. 221; 65 Stat. 96).

"firm resettlement" exception in its definition of a refugee, as follows:

> Sec. 2. (a) "Refugee" means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.[12]

d. When the Refugee Relief Act expired at the end of 1956, over 18,000 of the numbers which might have been allotted for visas remained unused. A bill passed in 1957 permitted the visas to be divided among "refugee-escapees."[13] 71 Stat. 639, 643–644. Although not expressly referring to the concept of resettlement, this legislation was uniformly administered under Depart-

[12] In H. Conf. Rep. 1069, 83d Cong., 1st Sess. 10, managers on the part of the House stated that although "firm resettlement" is not a defined term, it was not designed to exclude prospective beneficiaries of the legislation automatically on the ground that they have been collectively, by law or edict, granted full or limited citizenship rights and privileges in any area of their present residence. This statement suggests that *individual* circumstances showing firm resettlement was the crucial consideration in determining eligibility under this legislation.

[13] A refugee-escapee was defined as "any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist-occupied area, or (B) from any country within the general area of the Middle East, and who cannot return to such area, or to such country, on account of race, religion, or political opinion." 71 Stat. 643, Section 15(c)(1).

ment of State regulations as excluding firmly resettled aliens from its benefits.[14]

2. The "Fair Share" Act of 1960

On December 5, 1958, the United Nations adopted a resolution to establish a World Refugee Year to focus interest on the refugee problem; an important purpose was to encourage countries to provide permanent refugee solutions, through voluntary repatriation, resettlement or integration. On May 19, 1959, President Eisenhower issued a proclamation declaring the year beginning July 1, 1959, World Refugee

[14] 22 C.F.R. 44.1 (1958), published in 22 F.R. 10826, December 27, 1957, provided in pertinent part as follows:

> § 44.1 *Definitions.* The following definitions, in addition to the pertinent definitions contained in section 15 of the act of September 11, 1957, section 101 of the Immigration and Nationality Act and Part 42 of this chapter, shall be applicable to this part:
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> * * * * *
>
> (d) "Firmly resettled" means the status of an alien, who at any time after the occurrence of events which form the basis of his claim to a refugee status, has been reestablished in a home under circumstances which indicate his intention and assure him a reasonable opportunity of remaining permanently. Nothing in this paragraph shall be construed as an exclusive definition of the term "firmly resettled" inasmuch as the facts and circumstances in the individual case must necessarily determine the question of firm resettlement.
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> * * * * *
>
> (f) "Refugee" means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, *who has not been firmly resettled and who is in urgent need of assistance for the essentials of life or for transportation.* [Emphasis added.]

Year in support of the United Nations objectives. (S. Rep. No. 1651, 86th Cong., 2d Sess., p. 6; H. Rep. No. 1433, 86th Cong., 2d Sess., p. 4). The resulting "Fair Share" Act, 74 Stat. 504, was the immediate predecessor of the current Section 203(a)(7) of the Immigration and Nationality Act. It provided for use of the Attorney General's general power to parole aliens under Section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. 1182(d)(5).[15]

The "fair share" provision was introduced into the legislation by the House Committee on the Judiciary. H. Rep. 1433, 86th Cong., 2d Sess. 1. The report pointed out (*id.* at 3–4)):

> There remain in Europe at the present time a residue of displaced persons and refugees enjoying the assistance and legal protection of the United Nations High Commissioner for Refugees under a mandate established pursuant to Resolution 428(V) adopted by the General Assembly of the United Nations on December 14, 1950. An internationally concerted effort is being made to find *resettlement opportunities in the countries of the free world for these refugees. The primary purpose of that drive is to*

[15] The Act provided in general for parole into the United States of alien refugee-escapees, as defined in the Act of September 11, 1957 (see *supra*, n. 13), who applied for parole while physically present within the limits of any country which was not Communist, Communist-dominated, or Communist-occupied, who were not nationals of the area in which the application was made, and who were within the Mandate of the United Nations High Commissioner for Refugees. The number of refugee-escapees to be admitted to the United States for permanent residence under this program was to be determined as 25% of the number of similar "resettlement opportunities" afforded by other cooperating countries.

> *close the several refugee camps still maintained after the 15 years which have elapsed since the end of World War II.* This effort is stimulated by the resolution of the General Assembly of the United Nations adopted on September 5, 1958, for the purpose of promulgating the World Refugee Year beginning on July 1, 1959. The resolution was submitted by the United Kingdom and cosponsored by the United States and eight other nations. * * * Implicit in the resolution is the hope that new sources of assistance for refugees will be found during the World Refugee Year, such help including (1) financial and material assistance in the integration into the local economies of those refugees who are unable or unwilling to move from the countries of first asylum and (2) *by offering resettlement opportunities for those who fall in the category of "emigrables."* The latter term includes refugees who desire to emigrate, mostly overseas, and fit into the existing framework of immigration requirements set up by countries willing to accept new settlers. * * * [Emphasis added.]

The fact that the Fair Share Act did not make specific reference to the firm resettlement concept or incorporate by reference international criteria containing such limitations is not significant; that notion was emphasized in the legislative reports.[16] Congress thus made it clear that the Attorney General's parole

[16] At all events, as the Second Circuit pointed out in *Shen v. Esperdy*, *supra*, 428 F. 2d at 300, the "specialized purpose of the Fair Share Law—participation in the World Refugee Year in order to close out the D.P. camps of Europe—cuts against any interpretation of this enactment as a pervasive declaration of immigration policy."

discretion was to be limited to *bona fide* refugees who had not been firmly resettled. The primary concern in this regard was the liquidation of the remaining refugee camps in Europe.[17] Congress understood that

[17] The Department of State expressed concern with the limited definition of refugees by reference to the mandate of the United Nations High Commissioner on the basis that it discriminated against certain classes of refugees principally in the Middle East and Far East who had been determined as falling outside that mandate. The Department recommended amending the resolution to provide (S. Rept. No. 1651, *supra*, at 19):

> (1) that a maximum of 10,000 refugees be admitted annually with additional provisions to provide for emergency situations, and (2) that the following proposed amendment to line 2, page 2, (3) is any alien (A) who because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee from any Communist, Communist-dominated, or Communist-occupied area, or from any country within the general area of the Middle East, and who cannot return to such area or country on account of race, religion, or political opinion, or (B) who is out of his usual place of abode because of a natural calamity, military operations, or political upheaval, and who is unable or unwilling to return to his usual place of abode, and (C) who is in a country or area which is neither Communist nor Communist-dominated, and (D) who has not been firmly resettled and is in urgent need of assistance for the essentials of life.

This recommendation was rejected by both committees on the basis that "enlargement of the scope of this legislation as suggested by the Department of State will not be conducive to the achievement of the primary aim of House Joint Resolution 397, as amended, which is to contribute to the closing of the remaining displaced persons and refugee camps in Europe, such aim coinciding with the determined camp liquidation program of the United Nations High Commissioner for Refugees." H. Rep. No. 1433, *supra*, at 12; S. Rep. No. 1651, *supra*, at 18–19.

the *settlement program* of the United Nations High Commissioner was a camp liquidation effort and did not contemplate marshalling resources to relocate persons economically, socially or legally integrated into the countries of their first asylum, as here, or resettled in another country. Both committees considering the legislation made it clear that the provision was to benefit unsettled refugees (S. Rep. No. 1651, *supra*, at 26; H. Rep. No. 1433, *supra*, at 14):

> The committee believes that if enacted and wisely used, these sections of the joint resolution [(H.J. Res. 397) which evolved into the Act] will greatly contribute to the resettlement of the *diminishing residue of unsettled refugees* and permit the United Nations High Commissioner for Refugees to achieve the main purpose of the World Refugee Year, the liquidation of camps. [Emphasis added.]

That persons "firmly resettled" in the country of first asylum were not intended beneficiaries of the "resettlement opportunities" created by the Act was further indicated by the Senate Committee on the Judiciary (S. Rep. No. 1651, *supra*, at 24–25):

> In using the term "resettlement opportunities" the committee had in mind the traditional meaning of that term as developed in various enactments since the end of World War II affecting the migration of displaced persons, refugees, and refugee-escapees. The import of such term does not include persons who have been economically, socially or legally integrated in the countries of their "first asylum," but it refers solely to persons who have migrated and acquired permanent residence in countries

other than those in which they were found at the termination of hostilities or where they have sought asylum.

The term "resettlement opportunities" was thus significant to this legislation in two ways: not only did it define the type of relief Congress intended to assume a "fair share" of, but it formed the basis for determining the numerical limitation to be assumed by the United States by reference to the number of "resettlement opportunities" afforded refugees by other cooperating countries.

It was in this context that Congress took under consideration, in 1965, administration proposals to create, among other things, a permanent flexible worldwide refugee program; the result was the present statute (Section 203(a)(7) of the Immigration and Nationality Act of 1952, as amended by the Act of October 3, 1965 (79 Stat. 912–913), 8 U.S.C. 1153(a)(7)), to which we now turn.

B. THE PRESENT STATUTE RETAINS THE FIRM RESETTLEMENT CONCEPT

1. In 1965, the executive branch submitted proposals to Congress for major reform of the country's immigration law. Among other things, it sought permanent, flexible refugee legislation in lieu of the temporary, special-purpose legislation which had been enacted in the past, replacing the "Fair Share" Act then in effect.[18] The bill as passed adopted this basic

[18] Section 3 of the Administration bills (H.R. 2580 and S. 500, 89th Cong.), provided that the President could reserve up to ten percent of the new pool of a reserve quota of visas for allocation to refugees who would not come within the "Fair Share"

concept, and created the seven preference categories now contained in Section 203 of the Act. The refugee provisions of the new law maintained the basic characteristics they had when reported out of the House Subcommittee,[19] establishing a special preference category for refugees—the so-called seventh preference—in the scheme of priorities for qualifying for permanent residence in the United States. The Section does not use the term "refugee" but speaks of persons who have "fled" to escape "persecution" or "catastrophic natural calamity"; its language and history show, however, that its benefits are meant to be reserved for refugees who have not been firmly resettled elsewhere.

Testimony on behalf of the Administration proposal shows clearly that the Administration did not contemplate altering the concept of resettlement strongly rooted in the earlier legislation and administrative practices; the principle remained that an alien ceases

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Act. This provision was designed to cope with refugee emergencies. Administration spokesmen noted that refugees are uprooted persons or those who flee from persecution with no opportunity to plan for movement to a new home through normal immigration procedures and that the political interest of the United States might well make it desirable that this country take a share of these new refugees. See testimony of Abba P. Schwartz, Administrator, Bureau of Security and Consular Affairs, before Senate Subcommittee on Immigration and Naturalization in Hearings on S. 500, p. 173.

[19] The House Subcommittee rejected, most notably, the Administration's ten percent quota proposal. The Senate Judiciary Committee added several minor amendments including the addition of "catastrophic natural calamity" to the reasons for admitting refugees under the seventh preference (S. Rep. No. 748, 89th Cong., 1st Sess., 3, 16).

to be a refugee for immigration purposes once he has become firmly resettled following his flight from his homeland.[20] Although, as noted, the House Committee reacted unfavorably to certain of the Administration's proposals (p. 20, n. 19, *supra*), it nevertheless made clear its intent to enable the President to act immediately to meet refugee emergencies and to continue the country's long-standing policy of resettling refugees who were homeless. Its report stated (H. Rep. 745, 89th Cong., 1st Sess. 15):

> Legislation to enable the United States to participate in the resettlement of refugees has been part of our immigration policy continuously since the close of World War II. Permanent provision is made for the conditional entry of up to 10,200 refugees annually to continue the traditional policy of the United States to offer refuge to persons oppressed or persecuted because of their race, religion, or opposition to totalitarian beliefs. This new section of the law will permit the President to act immediately, if the situation so requires, to come to the aid of refugees as defined in this bill. The Congress, charged with the constitutional responsibility for the regulation of immigration, reserves the power to review the case history of every refugee conditionally entered into the United

[20] See testimony of Abba P. Schwartz, before Senate Subcommittee on Immigration and Naturalization in Hearings on S. 500, pp. 171–214; also testimony of George Warren, Adviser on Refugee Affairs, Department of State, before House Committee on the Judiciary, Subcommittee No. 1, in Hearings on H.R. 2580. 89th Cong., 1st Sess. 68–86.

States to determine whether the interests of this country are subject to outside pressures.

The Senate Committee on the Judiciary, in commenting upon its proposed amendment to H.R. 2580 to include the "catastrophic natural calamity" provision (p. 20, n. 19, *supra*) in Section 203(a)(7) stated (S. Rep. No. 748, 89th Cong., *supra*, at 16):

> * * * The Congress, in a prior case, granted relief to such persons through the enactment of the Refugee Relief Act of 1953, where the term "refugee" was defined as follows:
>
> > Sec. 2(a) "Refugee" means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity, or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.
>
> Refugees have been admitted to the United States through the sponsorship of voluntary agencies and private citizens. The Committee anticipates that such practice will continue so that each refugee will have an opportunity to adjust and develop in this country without fear of abandonment and without the possibility of becoming a public charge.
>
> The conditional entry of refugees as proposed in this bill is not unlike the parole procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended

that the procedure remain the same. * * * [21]

2. The foregoing legislative history indicates that in 1965 Congress intended to change the existing statutory expression of our refugee policy in three basic ways: (1) to permit the United States to make its determination as to who is a refugee, rather than accept the determination made by the United Nations High Commissioner for Refugees; (2) to extend the definition of "refugee" to include persons who may become victims of a natural calamity; and (3) to eliminate the use of the word "parole" when allowing refugees to enter the United States because that word has a connotation unfavorable to the alien.

At the same time, there was no Congressional intent to depart from established policies and procedures for the settlement of refugees. Although the legislation that emerged did not use the word "refugee" or the phrase "firm resettlement", there is no indication

[21] A similar statement of views is contained in the House Report (H. Rep. No. 745, *supra*, at 15):

> The conditional entry of refugees as proposed in this bill is not unlike the parole procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended that the procedure remain the same. Since the use of the term "parole" conveys a connotation unfavorable to the alien, the substitute term "conditional entry" has been used to avoid any such implication. The so-called Fair Share Refugee Act (the act of July 14, 1960), with the exception of the sections which permit adjustment of status of refugees already admitted to the United States under its provisions, is repealed. The repeal of this legislation will again permit the United States to determine who is or who is not a refugee.

in the legislative history that Congress intended to retreat from its established policy of not accepting as refugees persons who fled their homeland but who have become firmly resettled in another country; indeed, the history points the other way.[22]

The consistent administrative interpretation has been that Section 203(a)(7) and its predecessors have not covered any alien who has firmly resettled in another country (see cases cited *supra*, p. 7, n. 4). The administrative view, "in cases of doubtful meaning, is accepted unless there are cogent and persuasive reasons for rejecting it." *United States* v. *Shreveport Grain and Elevator Co.*, 287 U.S. 77, 84. See also, *Chemical Bank New York Trust Co.* v. *Steamship Westhampton*, 358 F. 2d 574, 586–587 (C.A. 4), certiorari denied, 385 U.S. 921. There is no reason for rejecting that view here—particularly where Congress has been continuously aware of the practice of giving decisive importance to the concept of resettlement.[23]

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[22] See debate in the Senate, 111 Cong. Rec. 24225–24241, 24440–24444, 24446–24498, 24500–24504, 24544, 24557, 24738–24739, 24745–24785.

[23] In addition to the published administrative decisions already cited, periodic reports have been submitted by the Immigration Service to Congress which note the number of such actions taken in a particular period of time. See remarks of Congressman Feighan, 113 Cong. Rec. 22787–22788, which read into the record a report setting forth statistics on the operation of Section 203(a)(7) for the six-month period ending June 30, 1967. The report shows that 53 applications were rejected during that period under "established screening procedures" because the aliens were "firmly settled."

As this Court said in *Udall* v. *Tallman*, 380 U.S. 1, 16:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable, one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n* v. *Aragon*, 329 U.S. 142, 153. See also, *e.g.*, *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. * * *

The administrative practice is particularly entitled to weight when, as here, it is based upon a complex statutory scheme whose antecedents plainly justify the practice.

3. Of course, refugee legislation reflects primarily a humanitarian concern for uprooted persons. In considering the distribution of 14,556 visas under earlier proposed legislation, the Senate Judiciary Committee expressed its intention that it "be made in a fair and equitable manner without any prescribed numerical limitations for any particular group, according to the show-

ing of hardship, persecution, and the welfare of the United States." [24] During the discussion on the floor of the House the intent was expresed "that those who administer this program give primary consideration, in granting these visas, to bona fide refugees from Communist—or other persecution, who have special abilities, training or skills which will make them of maximum value to the United States of America." [25] These statements crystallize the basic refugee policy that the need to help in resettling the world's homeless takes precedence over other general immigration policies. Viewed against the background we have detailed, the court of appeals' decision would virtually nullify this congressional policy of resettlement of *bona fide* refugees in emergency circumstances.[26]

4. The court of appeals noted that Section 203(a)(7) prohibits an alien from applying for conditional entry from a country of which he is a "national",

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[24] S. Rep. 1057, 85th Cong., 1st Sess., p. 6 (1957).

[25] Representative Judd from Minnesota, 103 Cong. Rec. 16304-16305.

[26] This legislative history further shows the error of the district court's rationale in this case—that the actual fact of firm resettlement is vitiated by the retention by the former refugee of an alleged subjective intent and desire to eventually settle, if possible, in the United States (295 F. Supp. at 1372) (A. 43). Congress' concern under the refugee provisions ends at the time the refugee, in objective fact, has been economically, socially or legally integrated in the country of first asylum. No doubt many of the refugees involved under previous legislation harbored the desire, if possible, eventually to come to the United States. This, however, was not the basis of this remedial refugee legislation aimed at unsettled refugees in emergent circumstances.

and drew from that fact an inference that Congress intended only this limitation, to the exclusion of any disqualification of resettled refugees (419 F. 2d at 254; A. 41). But the statutory language does not require any such inference, and the inference totally overlooks the legislative history we have discussed, assuming without justification that the limitations on "nationals" (which first appeared in the 1960 Act) was intended as a striking departure from previous policies on the treatment of refugees. This interpretation was considered and squarely rejected by the Second Circuit in *Shen* v. *Esperdy, supra.* As there pointed out (428 F. 2d at 297–299), the reference to "nationals" was limited to seven countries in Western Europe; it is inapplicable where, as in the instant case, the applicant is applying in this country under the proviso designed to enable aliens temporarily in this country who are eligible for the refugee preference to acquire adjustment of status to permanent residence. See *Tai Mui* v. *Esperdy,* 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017.

The more logical interpretation—and that suggested in *Shen, supra*—is that Congress was merely reflecting the primary concern of international organizations, which focused on refugees outside their country of nationality, during the period when it was enacting temporary legislation to assist in those international activities. It is likely that Congress considered that the displaced persons situation had so abated because of past resettlement programs and the rapid economic recovery of Western Europe

that no provision was necessary for nationals of non-communist countries who fled from permanent residence in a Communist country, such as East Germany, to the country of their nationality, even though a period would be required for firm settlement." Moreover, the 1960 statute provided relief to refugees from the Middle East. Thus, for example, the limitation on applications by "nationals" avoids unilateral assumption by this country of the vast Palestinian refugee problem in Jordan arising out of the creation of the State of Israel; although residing in camps in the country of their nationality, many of these refugees are not to this date "firmly resettled." It appears therefore that the nationality limitation was not meant as a congressional device to eliminate the "firmly resettled" principle, but to deal with other problems. Indeed, to adopt the approach below would permit a refugee who has acquired "nationality" in the country of his initial refuge to proceed to another country of which he is not a "national" to make application for entry

[37] In fact, it was not contemplated that a refugee who could go to the country of his nationality in the free world without fear of persecution would be granted entry into the United States under the 1965 Act, even though he was still in flight and was in a country other than his nationality. For example, a French Algerian fleeing to Italy would not have been eligible to come to the United States since he could proceed without fear of persecution to France, the country of his nationality. See Testimony of Mr. George Warren, Adviser on Refugee Affairs, Department of State, in the Hearings on H.R. 2580, *supra*, 89th Cong., 1st Sess. 69–70.

to this country. Congress could not have intended this absurd result.

In any event, Congress surely could not have intended to permit millions of refugees excluded under prior programs as firmly resettled to qualify now under the small quota of Section 203(a)(7), thereby displacing homeless refugees. As the Second Circuit put the matter in *Shen, supra,* 428 F. 2d at 302, "the flexibility afforded to the Executive in admitting refugees suffering from comparatively recent crises—whether political or natural—would be all but destroyed if [the countervailing view] were accepted * * * [T]he 10,200 entries or visas per year afforded under section 203(a)(7) could be quickly exhausted by aliens who have found relief by resettlement in new homes but who nevertheless still wish to immigrate to the United States. * * * [I]f this were allowed to happen 'the real refugee, the homeless, will go wanting.' " There is nothing in the statutory language that requires a result so contrary to the legislative intent.

CONCLUSION

The background and immediate history of Section 203(a)(7) shows that it was intended for refugees in emergent situations. A former refugee who is "firmly resettled" in another country is no longer a refugee. There is accordingly no reason to place him within the small quota entitled to benefits under Section 203(a)(7).

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded with directions that the order of the Regional Commissioner be reinstated.

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